ARTICLE 6

SPECIAL AGREEMENTS

❖ Text of the provision*

(1) In addition to the agreements expressly provided for in Articles 10, 23, 28, 33, 60, 65, 66, 67, 72, 73, 75, 109, 110, 118, 119, 122 and 132, the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision. No special agreement shall adversely affect the situation of prisoners of war, as defined by the present Convention, nor restrict the rights which it confers upon them.

(2) Prisoners of war shall continue to have the benefit of such agreements as long as the Convention is applicable to them, except where express provisions to the contrary are contained in the aforesaid or in subsequent agreements, or where more favourable measures have been taken with regard to them by one or other of the Parties to the conflict.

❖ Reservations or declarations

None

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* Paragraph numbers have been added for ease of reference.

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A. Introduction

1132 Agreements may be concluded between belligerents during armed conflicts. While ceasefires and peace agreements may be the best known among these, they are not the only ones. Parties to armed conflicts may reach agreements on various subjects, both in the course of hostilities and, especially in relation to protected persons who have been detained, after the end of a conflict. Thus, this article, common to all four of the 1949 Geneva Conventions,[1] recognizes that, despite the detailed nature of the Conventions and their Additional Protocols, the Parties to a conflict, as well as other High Contracting Parties, may wish to develop more specific rules to govern particular situations. Special agreements can be a means of adapting certain provisions of the Conventions and Protocols to specific situations, in the light of prevailing circumstances and modern technology, a feature that was foreseen and provided for in the Conventions themselves.[2]

1133 Article 6 confirms that the High Contracting Parties may conclude such agreements, sets an important limit with respect to the substance of those agreements, and clarifies their duration.

1134 With regard to non-international armed conflicts, it is important to recall that common Article 3 also encourages the Parties to such conflicts to conclude special agreements to bring into force all or part of the provisions of the Conventions.

1135 Article 6 is the keystone of the system of protection afforded by the Conventions and Protocols because it safeguards, as a minimum, the protections enshrined therein and prohibits any derogation from them. When special agreements are negotiated and concluded, no matter their form, it is imperative that the Parties act in good faith in all regards.

B. Historical background

1136 The conclusion of special agreements between belligerent Parties has long been a feature of armed conflicts. In fact, prior to the codification of international humanitarian law, such agreements played a significant role in governing relations between the Parties.[3] Perhaps not surprisingly, therefore, each of the Conventions that preceded the Geneva Conventions of 1949 provided for – or at

[1] Article 6 of the First, Second and Third Conventions and Article 7 of the Fourth Convention.
[2] See e.g. Article 44 of the Second Convention and Article 60(2) of the Third Convention.
[3] See, in particular, Véronique Harouel-Bureloup, *Traité de droit humanitaire*, Presses Universitaires de France, Paris, 2005, pp. 85 and 92–98, in relation to accords on the treatment of medical facilities and wounded and sick members of the armed forces. Regarding historical examples of agreements on the exchange, release and treatment of prisoners of war, see Stephen C. Neff, 'Prisoners of War in International Law: The Nineteenth Century', in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press, 2010, pp. 57–73. Older agreements include, for example, the Convention between Great Britain and France respecting Prisoners of War, London, 10 May 1854 (PRO FO 93/33/55A). In relation to armed conflicts at sea, an excellent example is the treaty for the exchange of all prisoners taken at sea, concluded between France and England

the very least, anticipated – the conclusion of special agreements to fill out the regimes set down therein. For example, the 1864 Geneva Convention anticipated the conclusion of agreements in arranging for the mutual return of wounded combatants,[4] while the 1906 Geneva Convention stipulated that '[t]he belligerents remain free, however, to mutually agree upon such clauses ... in relation to the wounded or sick as they may deem proper', and went on to specify areas in which they 'shall especially have authority to agree'.[5] The 1929 Geneva Convention on the Wounded and Sick also contained specific articles providing for the conclusion of such agreements.[6]

1137 During the First World War, the Parties negotiated and concluded many agreements in relation to prisoners of war over the course of the conflict, there being relatively few treaty rules in this regard at the time.[7] In fact, the provisions of the 1929 Geneva Convention on Prisoners of War were largely based on those agreements. At the same time, the High Contracting Parties to the 1929 Convention reserved 'the right to conclude special conventions on all questions relating to prisoners of war concerning which they may consider it desirable to make special provisions'.[8] Unfortunately, however, during the Second World War some States concluded agreements that modified the protections of the 1929 Convention in important respects,[9] such that prisoners of war lost some of their essential rights. The ICRC therefore proposed in 1947 that the Conventions expressly state that special agreements concluded between belligerents should in no circumstances reduce the standard of treat-

on 12 March 1780. That treaty set forth a number of protections, including for vessels carrying persons being repatriated and for medical and religious personnel tending to the naval personnel of either Party. See Pictet (ed.), *Commentary on the Second Geneva Convention*, ICRC, 1960, p. 3, citing Georges Cauwès, *L'extension des principes de la Convention de Genève aux guerres maritimes*, L. Larose, Paris, 1899, p. 16, and Ernst Julius Gurlt, *Zur Geschichte der internationalen und freiwilligen Krankenpflege*, F.C.W. Vogel, Leipzig, 1873, pp. 29 and 31. Agreements are also concluded between belligerent Parties and neutral States. See also Riccardo Monaco, 'Les conventions entre belligérants', *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 75, 1949, pp. 274–362.

[4] Geneva Convention (1864), Article 6.

[5] Geneva Convention (1906), Article 2.

[6] In particular, Article 2(2) provided: 'Belligerents shall, however, be free to prescribe, for the benefit of wounded or sick prisoners such arrangements as they may think fit beyond the limits of existing obligations.' See also Geneva Convention on the Wounded and Sick (1929), Articles 3, 12 and 13.

[7] There was no treaty relating exclusively to prisoners of war at the time. The pertinent rules in the 1907 Hague Convention (IV) were Articles 4–20. For the agreements, see e.g. Agreement between the British and Ottoman Governments respecting Prisoners of War and Civilians (1917). For further examples, see Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 79. See also Alan R. Kramer, 'Prisoners in the First World War', in Sibylle Scheipers (ed.), *Prisoners in War*, Oxford University Press, 2010, pp. 75–90, especially at 76–77; Allan Rosas, *The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflicts*, Åbo Akademi, Turku/Åbo, 1976, reprinted 2005, pp. 51–69.

[8] Geneva Convention on Prisoners of War (1929), Article 83(1).

[9] See Catherine Rey-Schyrr, *De Yalta à Dien Bien Phu: Histoire du Comité international de la Croix-Rouge 1945–1955*, ICRC/Georg, Geneva, 2007, pp. 165–167, and Bugnion, pp. 436–437.

ment of prisoners of war or of any other protected persons.[10] Although some concerns were raised by one delegation,[11] this view was approved by the Diplomatic Conference in 1949.[12]

1138 In the post-1949 era, special agreements have been concluded in relation to the repatriation of wounded and sick prisoners of war.[13] A number of others have been concluded in relation to the general repatriation and exchange of prisoners of war and detained civilians and the exchange or return of dead bodies.[14] In other contexts, attempts have been made to conclude special agreements to evacuate wounded and sick members of the armed forces and civilians from encircled areas.

C. Discussion

For a discussion of the substance of special agreements related to specific articles of the Conventions, see the commentaries on those articles.

1. The irrelevance for Article 6 of the form and timing of an agreement

1139 Any agreement between the High Contracting Parties affecting or relating to the rights of protected persons under the Geneva Conventions and Additional Protocol I is governed by Article 6. It makes no difference whether an agreement is bilateral or multilateral, nor does it have to relate solely to a particular Convention or to a particular right for it to qualify as a special agreement. For example, a ceasefire or armistice agreement will constitute a 'special agreement' within the meaning of Article 6 if it contains clauses relating to the rights of protected persons set down in any of the Conventions or Additional Protocol I.[15]

1140 A wide variety of agreements may be considered to be 'special agreements' for the purposes of Article 6. The diversity of those listed in the article itself testifies to this fact.[16] The Third Convention expressly provides for the conclusion of agreements in the following domains:

[10] Wilhelm, pp. 561–590, especially at 573–576.
[11] For a discussion of a proposed amendment seeking to circumscribe the limitation, see section C.6.
[12] See *Report of the Conference of Government Experts of 1947*, p. 259; see also *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 109.
[13] For example, the repatriation of wounded Egyptian prisoners of war from Israel in 1956; see Françoise Perret and François Bugnion, *De Budapest à Saigon: Histoire du Comité international de la Croix-Rouge*, ICRC/Georg, Geneva, 2009, p. 93.
[14] See Bugnion, Appendix I, Table of Special Agreements, pp. 1029–1043.
[15] This is also the interpretation of the United Kingdom; see *Manual of the Law of Armed Conflict*, 2004, p. 266, para. 10.24. That said, such agreements may lead to changes which end the applicability of certain rules of international humanitarian law, although it is the actual change in factual circumstances and not the mere existence of an agreement that has this effect.
[16] Each version of Article 6 (Article 7 of the Fourth Convention) lists articles referring to special agreements specific to the Convention concerned, further underlining the broad scope of topics on which such agreements may be concluded.

a. appointment of an impartial organization as a substitute for a Protecting Power (Article 10(1));
b. marking of prisoner-of-war camps (Article 23(4));
c. credit balance of profits made by camp canteens after a camp is closed down (Article 28(3));
d. relief of retained medical personnel and chaplains (Article 33(3));
e. amounts of advances of pay due to prisoners of war (Article 60(2));
f. notification of the amount of the accounts of prisoners of war (Article 65(4));
g. winding up of accounts of prisoners of war (Article 66(2));
h. adjustments between Parties in respect of advances of pay, money transfers and compensation to prisoners of war (Article 67);
i. sending of individual parcels or collective relief shipments (Article 72(4));
j. receipt and distribution of collective relief shipments (Article 73);
k. transport of capture cards, correspondence, relief shipments, legal documents, correspondence, lists and reports exchanged between the Central Tracing Agency and the national information bureaux, and correspondence and reports relating to prisoners of war (Article 75(3));
l. direct repatriation or internment in a neutral country of 'able-bodied' prisoners of war who have undergone a long period of captivity (Article 109(2));
m. fixing of conditions for repatriation and of status of prisoners of war accommodated in a neutral country (Article 110(3));
n. equitable apportionment of costs of repatriation of prisoners of war between the frontier or port of embarkation of the Detaining Power and the territory of the Power on which the prisoners depend (Article 118(4)(b));
o. forwarding of personal effects of repatriated prisoners of war (Article 119(4));
p. establishment of commissions to search for dispersed prisoners of war and to ensure their repatriation (Article 119(7));
q. transmission of personal effects, other than personal valuables, of prisoners of war who have been repatriated or released, or who have escaped or died (Article 122(9));
r. establishment of an enquiry procedure concerning any alleged violation of the Convention (Article 132(2)).

1141 The above list serves merely as an indication of the kinds of agreements possible under the Convention, for there are other articles that refer to agreements between the belligerents, be they to encourage such arrangements, to prohibit them or to ensure that they have no impact on the rights of protected persons.[17] For example, the following situations may also involve the conclusion of agreements:

[17] See also Article 10(5) (prohibition on any derogation from the provisions relating to substitutes for Protecting Powers if one of the Powers is restricted in its freedom to negotiate).

a. establishment of a conciliation procedure for the application or interpretation of the Convention (Article 11(2));
b. determination of cases of disability or sickness entailing direct repatriation or accommodation in a neutral country (Article 110(4));
c. internment of prisoners of war in the territory of a neutral Power until the close of hostilities (Article 111).

In addition, there are cases where, although the Convention does not include any express provision to that effect, the conclusion of special agreements may be necessary or helpful. For example, special agreements could be useful in arranging procedures for handling the dead and their burial.[18]

1142 Additional Protocol I also recognizes the possibility of concluding special agreements,[19] and a number of articles in the Protocol provide for the conclusion of agreements on specific topics. As Protocol I supplements the Geneva Conventions of 1949,[20] such agreements are also covered by common Article 6 (Article 7 of the Fourth Convention). This understanding also flows from the object and purpose of the Conventions and the Protocol, which is to set a minimum standard of protection in times of armed conflict. It is therefore understood that no special agreement concluded in respect of matters addressed in the Protocol can adversely affect the situation of protected persons as regulated by the Conventions or, when applicable, Additional Protocol I. Special agreements are provided for in Protocol I in relation to the following:

a. conditions governing the employment of trained, qualified personnel facilitating the application of the Conventions and the Protocol outside national territory (Article 6(4));
b. the protection of medical aircraft (Articles 25, 26, 27, 28, 29 and 31);[21]
c. arrangements for teams to search for, identify and recover the dead from battlefield areas (Article 33(4));
d. facilitating access to gravesites, protecting them, and facilitating the return of the remains of the deceased (Article 34(2));
e. providing additional protection for objects containing dangerous forces (Article 56(6));
f. the establishment of non-defended localities (Article 59(5) and (6));
g. the establishment, marking, use and protection of demilitarized zones (Article 60);
h. the use of distinctive signals by civil defence organizations for identification purposes (Article 66(5));

[18] See Article 120.
[19] Additional Protocol I, Article 4.
[20] Article 96(1) of Additional Protocol I states: 'When the Parties to the Conventions are also Parties to this Protocol, the Conventions shall apply as supplemented by this Protocol.'
[21] See also Additional Protocol I, Annex I, Article 6(3).

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i. relief actions for populations in territory other than occupied territory (Article 70(1));
j. supervision by the Protecting Power of the evacuation of children (Article 78);
k. the International Fact-Finding Commission (Article 90).

1143 Lastly, Additional Protocol III stipulates that the 'medical services and religious personnel participating in operations under the auspices of the United Nations may, with the agreement of participating States, use one of the distinctive emblems' (i.e. the red cross, the red crescent, the red lion and sun, or the red crystal),[22] thereby allowing for the conclusion of agreements in this respect.[23]

1144 These examples illustrate that the term 'agreement' encompasses a wide range of possibilities. It can refer to purely local or provisional agreements (e.g. on the relief of retained medical personnel and chaplains), to what would amount to regulations (e.g. on advances of pay) or indeed to more formal agreements (e.g. on a substitute for a Protecting Power or on an enquiry procedure). Thus, the notion of special agreements must be interpreted in a very broad sense, with no limitation on form or timing.[24]

1145 Furthermore, Article 6 applies to agreements regardless of whether they are written, unwritten, tacit,[25] bilateral, multilateral, limited or unlimited in their duration, or even arrived at through the use of signals.[26] While such agreements will only be governed by the 1969 Vienna Convention on the Law of Treaties if they are in written form,[27] general international law recognizes that agreements that are not set down in writing or otherwise recorded may also be

[22] Additional Protocol III (2005), Article 5.
[23] No other special agreements on the emblem are foreseen in the Geneva Conventions or their Additional Protocols.
[24] Other instruments relating to protection in armed conflicts also refer to specific areas in respect of which agreements may be concluded. For example, Article 24 of the 1954 Hague Convention for the Protection of Cultural Property is a general provision similar to Article 6. The 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea refers to a number of areas in which the Parties to a conflict are encouraged to conclude agreements (see, in particular, paras 11, 47(c), 53, 91 and 177). Rule 99 of the 2009 Manual on International Law Applicable to Air and Missile Warfare also affirms the possibility of concluding agreements to protect persons or objects not covered by the Manual. When such agreements relate in substance to protections set down in the Geneva Conventions, they will also be governed by Article 6.
[25] For example, in the conflict between Argentina and the United Kingdom in 1982, the Parties resorted to tacit agreements to create pauses in the hostilities in order to collect the wounded. See Sylvie-Stoyanka Junod, *Protection of the Victims of Armed Conflict, Falkland-Malvinas Islands (1982): International Humanitarian Law and Humanitarian Action*, ICRC, Geneva, 1985, p. 26. See also United States, *Law of War Deskbook*, 2010, p. 56, note 16.
[26] On tacit agreements and signals specifically, see Verdross/Simma, pp. 440–443, paras 683–689. See also the commentaries by Philippe Gauthier, '1969 Vienna Convention. Article 2: Use of terms', in Corten/Klein, pp. 38–40, paras 14–18, and by Yves Le Bouthillier and Jean-François Bonin, '1969 Vienna Convention. Article 3: International agreements not within the scope of the present Convention', in Corten/Klein, pp. 66–76.
[27] Vienna Convention on the Law of Treaties (1969), Article 2. Other questions of general treaty law may also be relevant.

treaties.[28] In this vein, it must be pointed out that, even if unilateral declarations by States might not amount to 'agreements' in the formal sense, in view of the capacity of such statements to create binding legal obligations on the States formulating them, they must respect the requirements of Article 6.[29] Special agreements may also be made through mutual and concordant declarations of intent, issued orally and without any other formality, but they may need to be particularly clear and precise in order to be viable.[30] As a matter of policy, it is desirable to set down special agreements in writing wherever possible.[31]

1146 Special agreements create binding legal obligations on States.[32] Agreements must be 'scrupulously adhered to'.[33] This is the case whether they are concluded between government representatives with full treaty-making powers or by belligerent commanders on the battlefield in respect of a particular issue or locality.[34] Some military manuals nonetheless point out that it is fairly uncommon nowadays for commanders on the battlefield to enter into direct negotiations with one another, and that communication between belligerents tends to occur at an 'intergovernmental level'.[35]

1147 In terms of timing, it is important to note that an agreement need not be concluded *during* an armed conflict in order to be a special agreement. It is not when the agreement is concluded that matters, but whether its terms in substance affect a right afforded by one of the Conventions or Protocol I. Some agreements will be concluded during the conflict – for example with respect to

[28] *Ibid*. Article 3. See Yves Le Bouthillier and Jean-François Bonin, '1969 Vienna Convention. Article 3: International agreements not within the scope of the present Convention', in Corten/Klein, pp. 69–70, para. 9, and Hollis, pp. 23–24.

[29] See ILC, 'Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto', *Yearbook of the International Law Commission 2006*, Vol. II, Part two, 2013, pp. 161–166. See also ICJ, *Nuclear Tests case (Australia* v. *France)*, Judgment, 1974, p. 253, and *Nuclear Tests case (New Zealand* v. *France)*, Judgment, 1974, p. 457.

[30] The ICJ has stated that a joint communiqué by States may constitute an international agreement; see *Aegean Sea Continental Shelf case*, Judgment, 1978, para. 96. As a German ambassador wrote in regard to declarations of intent expressed in joint communiqués, '[e]verything depends on content and circumstances'; Hartmut Hillgenberg, 'A Fresh Look at Soft Law', *European Journal of International Law*, Vol. 10, 1999, pp. 499–515, at 507, note 42.

[31] When it comes to prisoners of war, there is, in addition, an obligation to post any special agreements – in a language the prisoners understand – alongside the text of the Third Convention in prisoner-of-war camps; see Article 41.

[32] See Julius Stone, *Legal Controls of International Conflict*, Maitland Publications, Sydney, 1954, p. 636; Fitzmaurice, p. 309; and Verdross/Simma, p. 443, para. 687, with further references. But see Baxter, p. 366, for a more ambiguous view. At the very least, even Baxter admits that 'there may be an obligation upon the part of States not to take measures that would prejudice the carrying into effect of these undertakings'.

[33] United Kingdom, *Manual of the Law of Armed Conflict*, 2004, p. 262, para. 10.13; United States, *Field Manual*, 1956, para. 453: 'It is absolutely essential in all nonhostile relations that the most scrupulous good faith shall be observed by both parties, and that no advantage not intended to be given by the adversary shall be taken.'

[34] On the possibility for military commanders to negotiate and conclude binding agreements, see Peter Kovacs, 'Article 7. Full powers', in Corten/Klein, p. 143, para. 67, and Verdross/Simma, p. 443, para. 687, with further references.

[35] Canada, *LOAC Manual*, 2001, p. 14-1, para. 1401.2; United Kingdom, *Manual of the Law of Armed Conflict*, 2004, pp. 258–259, para. 10.3.1.

the accommodation or internment of prisoners of war in the territory of a neutral country – whereas others may be arrived at after the end of hostilities. Agreements relating to prisoners of war, for example, have even been concluded long after the end of a conflict but while the Third Convention was still applicable.[36] In addition, some special agreements could be concluded between the High Contracting Parties even when there is no armed conflict.[37] All of these agreements, no matter when they are concluded, are subject to the rules laid down in Article 6.

1148 Ideally, in order to ensure that different perspectives are identified and addressed in the agreements, negotiations should include persons of different genders and backgrounds.[38]

1149 With regard to agreements between an Occupying Power and local authorities in the territory it occupies, Article 47 of the Fourth Convention will govern the interpretation of such agreements together with Article 6.[39]

1150 Article 6 refers to all special agreements concluded between the High Contracting Parties and not just to those between Parties to a conflict. This was a conscious choice of the drafters to allow, for example, for agreements between Parties to a conflict and neutral States in regard to the transfer of prisoners of war to be subject to the requirements of the article.[40]

2. Special agreements and non-State entities

1151 Article 6 applies to agreements between High Contracting Parties, meaning States.[41] At times, however, special agreements will be concluded between States party to a conflict and signed also by non-State entities, such as the ICRC or another organization.[42] The participation of an organization such as

[36] See e.g. ICRC, 'Iran: 20th anniversary of prisoner-of-war repatriation', Press release, 16 August 2010. See also Harroff-Tavel, pp. 465–496, especially at 475–78.

[37] See e.g. in relation to zones (Article 23 of the First Convention, Article 14 of the Fourth Convention and Article 60 of Additional Protocol I).

[38] See UN Security Council, Res. 1325, 31 October 2000, para. 1. There is a growing acknowledgement that women, men, girls and boys are affected by armed conflict in different ways, and that, accordingly, the representation of both women and men at all decision-making levels in national, regional and international institutions and mechanisms for conflict prevention, management and resolution benefits the process. The application of international humanitarian law should also reflect this understanding.

[39] John Quigley, 'The Israel-PLO Agreements Versus the Geneva Civilians Convention', *Palestine Yearbook of International Law*, Vol. 7, 1992–1994, p. 45. (This will mostly arise in relation to Article 7 of the Fourth Convention and not Article 6 of the First, Second or Third Convention.)

[40] *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 109.

[41] In circumstances where Article 96(3) of Additional Protocol I applies, Article 6 may also apply to agreements concluded between '[t]he authority representing a people engaged [in an armed conflict] against a High Contracting Party' and other High Contracting Parties. For special agreements between States and organized armed groups in the context of non-international armed conflicts, see the commentary on Article 3, section K.

[42] See ICRC, 'Iran/Iraq: significant step forward in search for missing persons from 1980–1988 war', Press release, 16 October 2008, regarding the conclusion of a memorandum of understanding between Iran, Iraq and the ICRC.

the ICRC in the conclusion of an agreement in itself does not affect the application of Article 6 to that agreement between the High Contracting Parties. Indeed, there is no reason why Article 6 would not apply formally to agreements concluded between a High Contracting Party and an international organization such as the United Nations. Whatever the case, in substance such agreements must respect the principle that they may not in any way diminish the protection afforded by the Conventions.

1152 There have also been cases where 'two belligerents reach separate agreements with the ICRC in order to resolve some specific humanitarian issue, while refusing any direct contact with each other'.[43] It goes without saying that the ICRC would not agree to participate in such an agreement if it considered that the proposed agreement would derogate impermissibly from international humanitarian law. In cases where the Parties to the conflict conclude parallel, complementary agreements on their conduct in fields regulated by the Third Convention with an organization such as the United Nations or the ICRC, these agreements would be treated as special agreements for the purposes of Article 6. In other words, Parties to a conflict cannot circumvent the requirements of Article 6 by concluding parallel agreements via the intermediary of an organization, even if that organization appears as the counterpart to the agreement. Pure legal formalism cannot circumvent the purpose of this provision and the Geneva Conventions in general.

1153 Agreements between Parties to a non-international armed conflict are governed by common Article 3.[44]

3. *Special agreements and third parties*

1154 Under the general rules of international treaty law, international agreements do 'not create either obligations or rights for a third State without its consent'.[45] Obligations may only arise under certain circumstances and if the third State 'expressly accepts that obligation in writing',[46] but it is possible to create rights for third States without their express consent.[47] When it comes to international organizations, the treaty regime is similar, but, unlike for States, the assent of an organization to a right accorded to it is not presumed.[48] The assent of the organization is 'governed by the rules of the organization'.[49]

1155 From the perspective of the ICRC, this can be relevant. It is not unusual for High Contracting Parties to conclude special agreements that set out a role for

[43] Bugnion, pp. 392–394.
[44] For further details, see the commentary on Article 3, section K.
[45] Vienna Convention on the Law of Treaties (1969), Article 34.
[46] *Ibid.* Article 35.
[47] *Ibid.* Article 36.
[48] Vienna Convention on the Law of Treaties between States and International Organizations (1986), Articles 34–36.
[49] *Ibid.* Article 36(2).

the ICRC in supervising or assisting in the implementation of the accord. Where the ICRC has not been involved in the negotiation of such an agreement and/or has not had an opportunity to consent to or refuse such a role, it is not bound by the terms of that agreement. This occurred, for example, in the context of the 1948 agreement with respect to a truce in Palestine.[50] As the ICRC had misgivings about the role provided for it in that agreement, it instead took on a role that was more in line with its method of working in conformity with the principles of neutrality, impartiality and independence.[51] On other occasions, the ICRC has accepted roles set down for it in agreements to which it was not a party.[52] In principle, the ICRC is likely to accept a role conferred on it through a special agreement that respects international humanitarian law, including Article 6, that conforms to its working methods based on the principles of neutrality, impartiality and independence, and to which it has consented.

4. Special agreements and amendments

1156 An additional issue arising from general treaty law is the distinction between an amendment to a treaty and an agreement that modifies the treaty between the Parties to the agreement. Additional Protocol I contains an amending formula but has no general article on special agreements,[53] whereas the Geneva Conventions contain no amending formula but have a general article on special agreements (the present Article 6, Article 7 of the Fourth Convention). The distinction between amendment and modification of a treaty has significant consequences: under treaty law, amendments become automatically applicable to new Parties to a treaty, whereas special agreements that modify the treaty between existing Parties remain applicable only between them.[54]

1157 There should be no cause for confusing a special agreement with an amendment. As outlined in Article 97 of Protocol I, the process for adopting an amendment is more formal and rigorous than for special agreements and it

[50] Paragraph 8 of that agreement stated: 'Relief to populations of both sides in municipal areas ... shall be administered by an International Red Cross Committee [sic] in such a manner as to ensure that reserves of stocks of essential supplies shall not be substantially greater or less at the end of the truce than they were at its beginning.' UN Doc S/829, 8 June 1948, p. 3.

[51] The ICRC 'decided to confine its assistance to transporting supplies for hospitals' as it was concerned that the other role provided for it could lead it to provide food for combatants; see Bugnion, p. 391. See also 'The International Committee of the Red Cross in Palestine', *Revue internationale de la Croix-Rouge et Bulletin des Sociétés de la Croix-Rouge*, Supplement No. 8, August 1948, pp. 128–137, especially at 132–133.

[52] For example, when formally requested to fulfil the role set out for it in the New Delhi Agreement of 28 August 1973 between Pakistan and Bangladesh, the ICRC agreed; see Bugnion, p. 392.

[53] Nevertheless, Article 4 of Additional Protocol I recognizes the possibility of concluding special agreements. Article 97 of the Protocol contains the procedure for amendment.

[54] See Vienna Convention on the Law of Treaties (1969), Articles 40 and 41.

does not apply to the Geneva Conventions. In most cases, special agreements simply add to the existing set of applicable rules, help to implement them and bind only the Parties to them. As such, it would be rare that a special agreement would amount even to a modification of the Geneva Conventions. This interpretation holds true also in respect of special agreements specifically provided for in the Conventions and the Protocols: for example, the agreements provided for in Article 56 of Protocol I would constitute special agreements in the sense of Article 6 and not amendments.

5. *Special agreements and the threat or use of force*

1158 Special agreements are usually concluded in the context of armed conflict, where, almost inevitably, force is used. Article 52 of the 1969 Vienna Convention on the Law of Treaties stipulates that a treaty is void 'if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations'.[55] How does this rule relate to special agreements? Since the determination of the applicability of the rule in Article 52 depends on an appraisal of the *jus ad bellum*, the ICRC will not engage in such analysis, but will consider an agreement on its own terms, including its conformity with Article 6.

1159 Other bodies may engage in such analysis, however. It may therefore be helpful to note that, according to one view, '[a] treaty is only procured by coercion if the use or threat of force is directly intended to bring about the treaty or if the treaty is aimed at maintaining a situation which was created by an illegal use of force'.[56] Another view is that 'a treaty is only invalid if the victim of the coercion did not have any other choice but to conclude the treaty', thus very narrowly construing the rule.[57] In the context of Article 6, it can be anticipated that ambiguity in the validity of an agreement in the light of this rule will most likely arise in relation to ceasefire agreements.[58] The mere fact that an agreement was concluded in the context of an unlawful use of force or to mitigate the consequences of such a use of force does not make it void. This flows from the total separation between the *jus ad bellum* and the *jus in bello*, as agreements on humanitarian issues are independent of the use of force.

[55] In addition, according to Article 44(5) of the 1969 Vienna Convention on the Law of Treaties, 'no separation of the provisions of the treaty is permitted' in such cases.
[56] Michael Bothe, 'Consequences of the Prohibition of the Use of Force', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 27, 1967, pp. 507–519, at 513.
[57] Olivier Corten, '1969 Vienna Convention. Article 52: Coercion of a State by the threat or use of force', in Corten/Klein, pp. 1201–1220, especially at 1219, para. 39.
[58] *Ibid.* pp. 1217–1220.

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6. Limitations regarding special agreements

1160 The second sentence of Article 6(1) effectively confirms the 'non-derogability' of the rights enshrined in the Geneva Conventions.[59] It states that '[n]o special agreement shall adversely affect the situation of [protected persons] ... nor restrict the rights which it confers upon them'. By virtue of this clause, States willingly accepted to curb their freedom to conclude agreements that would diminish the protections afforded by the Conventions to persons affected by armed conflicts. This intent was clearly expressed during the negotiation of the Conventions, in particular in the reactions of States to the proposal by one State to reduce the scope of the 'safeguard' or limitation clause so as to prohibit only agreements that would undermine 'fundamental' provisions of the Conventions. That proposal was firmly rejected by other States on the basis of two principal objections: first, that 'it would be difficult to distinguish between rights of protected persons which were fundamental and those which were not'; and second, that '[s]uch a distinction might open the way to all kinds of abuse, and the purpose of the Conventions was to secure minimum guarantees for the persons which they were intended to protect'.[60] In addition, one delegate insisted that 'in no case may it be permitted to derogate from the rules established by the Conventions'.[61] This 'non-derogability' of international humanitarian law is nowadays widely accepted[62] and may be seen as an indication of the *jus cogens* character of its rules.

1161 What of special agreements that do not conform to the requirements of Article 6? As Meron states, 'treaties or agreements by which states themselves purport to restrict the rights of protected persons under the Conventions will

[59] On the fact that the Conventions confer rights on individuals, see the commentary on Article 7, section C.2.

[60] See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II-B, p. 109.

[61] Our translation of 'en aucun cas il ne doit pouvoir être dérogé aux règles fixées par les Conventions' (France). Similarly, the delegate from Monaco stated: '[N]ous sommes en présence ... de conventions qui seront des conventions humanitaires, des conventions qui ne vivent que si ... nous assurons aux maximum le fonctionnement de la clause de sauvegarde.' ('[W]e are in the presence ... of humanitarian conventions which will only be brought to life, if ... we ensure the fullest application of the safeguard clause.') *Minutes of the Diplomatic Conference of Geneva of 1949*, Joint Committee, 3d meeting, pp. 11 and 17. This concern was described thus in the Pictet commentaries:

> When the Governments which met in Geneva in 1949 expressly prohibited any derogatory agreement, they did so because they were aware of a great danger – namely, that the product of their labours, which had been patiently drafted in the best possible conditions (viz. in peacetime) might be at the mercy of modifications dictated by chance or under the pressure of wartime conditions. They were courageous enough to recognize this possible eventuality, and to set up safeguards against it. In that sense Article 6 is a landmark in the process of the renunciation by States of their sovereign rights in favour of the individual and of a superior juridical order.

Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, 1952, pp. 74–75. See also Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, 1960, p. 85.

[62] See e.g. ICTY, *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 73. See also Meron, pp. 251–253. Where the Conventions allow a derogation, it is explicitly provided for. See Article 5 of the Fourth Convention.

have no effect'.[63] In addition, under general international law, any treaty contrary to existing *jus cogens* norms is void according to the 1969 Vienna Convention on the Law of Treaties.[64] The same can be said for unilateral declarations of States.[65] For special agreements that purport to derogate from any norms of humanitarian law which amount to *jus cogens*, those rules provide an extra layer of protection.

1162 The tenor of that debate also underscores the broad scope of the 'safeguard clause'; it encompasses all of the rights and mechanisms contained in the Conventions and Protocol I, when applicable. Indeed, 'the rights which it confers upon them' refers to the whole body of safeguards which the Conventions afford to protected persons – in this case, prisoners of war. These safeguards reside likewise in all the arrangements which are stipulated in the interest of these persons, such as the protection of medical personnel and chaplains, supervision by the Protecting Powers, or penalties in cases of violations. In short, it may be said that the principle applies to all the rules of the Conventions – except perhaps the purely formal provisions contained in the last section – since the application of any one of these rules represents, directly or indirectly, a benefit for protected persons and a guarantee to which they are entitled. In addition, some provisions of the Conventions have specific rules on the permitted or prohibited content of special agreements. Of course, nothing prevents the Parties from undertaking further and wider obligations in favour of protected persons, but the obligations under the Geneva Conventions must be considered as representing a minimum.

1163 Here, as with common Article 7 (Article 8 of the Fourth Convention), the question may sometimes arise as to whether a proposed special agreement would put protected persons in a better or worse situation than that prescribed in the Conventions. It may not always be possible to determine immediately whether a special agreement 'adversely affects the situation of protected persons'. What happens when the situation is improved in some respects and adversely affected in others? In this respect, the corollary that special agreements may not 'restrict the rights' the Conventions confer on protected persons was designed to buttress this general safeguard. In the majority of cases, deterioration in the situation of the persons protected will be an immediate or delayed consequence of derogation. In practice, in its representations to the

[63] Meron, p. 252.

[64] Article 53 states, in part: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.' Article 53 is described as an 'emerging rule of customary international law' (Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff Publishers, Leiden, 2009, pp. 676–677) and as having 'gradually acquired the status of a customary rule' (Eric Suy, '1969 Vienna Convention, Article 53: Treaties conflicting with a peremptory norm of general international law ("jus cogens")', in Corten/Klein, pp. 1224–1233, at 1226, para. 5). See also Meron, p. 252.

[65] ILC, 'Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto', *Yearbook of the International Law Commission 2006*, Vol. II, Part two, 2013, pp. 161–166, Principle 8.

Parties, the ICRC will invoke special agreements that conform to humanitarian law and that enhance protection.

1164 An additional complicating factor when assessing whether special agreements conform to the requirements of the Conventions may sometimes arise in relation to the classification of a conflict as international or non-international. In the context of non-international armed conflicts, common Article 3(3) encourages Parties to conclude agreements bringing into force all or parts of the Geneva Conventions. Thus, the special agreements concluded in such circumstances may not comprise all of the protections laid down in the Conventions. In situations where the classification of a conflict as international or non-international may be highly controversial, and in the absence of an international body able to make a binding decision in this respect, it remains possible to conclude an agreement bringing into force large parts of the Conventions, but not all of them, despite the existence of common Article 6.[66]

1165 A special circumstance may exist, however. If, as a result of rare, specific circumstances, the application of a provision under the Convention entailed serious disadvantages for protected persons, would the 'safeguard clause' debar the Powers concerned from endeavouring to remedy the situation by an agreement departing from that provision? This is a question which the States concerned cannot settle on their own account. In such a situation, it would be for the Protecting Power, its substitute or an impartial humanitarian organization, responsible for looking after the protected persons to give their opinion, which itself should be based on the rule that is inherent in the safeguard clause that the situation of protected persons must not be adversely affected.[67] In that case, they could tolerate certain measures of derogation which the States concerned might take, either separately or by mutual agreement, with a view to remedying the situation.

1166 Certainly, if two belligerents were to agree to subject their nationals to treatment contrary to the Convention, it might be difficult for the protected persons concerned to oppose the conclusion and consequences of such an agreement. But it would then be the duty of the Protecting Power or its substitute, being responsible for scrutinizing the application of the Conventions,[68] to remind the belligerents of their obligations. Other factors too will doubtless enter into consideration, such as pressure by third States not involved in the conflict, pressure of public opinion or the fear of prosecution. The correct application of the Conventions is not a matter for the belligerents alone; it concerns the whole community of States.[69]

[66] For a contrary view, see ICTY, *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 73.
[67] For a discussion of the role of Protecting Powers and their substitutes, see the commentaries on Articles 8 and 10, respectively. See also Introduction, section A.3.e.
[68] See Articles 8 and 10.
[69] See also the commentary on Article 1, section A.

7. Duration of special agreements

1167 Article 6(2) confirms that, except where otherwise provided in the agreement itself or in subsequent agreements, or where 'more favourable measures have been taken with regard to [the protected persons]', special agreements remain applicable for as long as the Geneva Conventions and Additional Protocol I apply.[70] This paragraph had been introduced in the 1929 Geneva Convention on Prisoners of War at the request of Germany, since Article 10 of the 1918 Armistice Agreement had abrogated the agreements concluded between the belligerents in the First World War with regard to prisoners of war.[71] It prevents a victorious Party from rescinding via an armistice agreement any better treatment it may have accorded to protected persons during the conflict. This may in particular be important for prisoners of war who have not yet been repatriated.

1168 Each of the Geneva Conventions and Additional Protocol I specifies the duration of its application to the persons it protects; Article 6 affirms that the same standard applies in regard to special agreements, unless they have been superseded by agreements providing better protection. Thus, this paragraph serves to underline that the protections in the Conventions are the minimum standard required.

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[70] In this light, it is helpful to recall that the content or text of special agreements must be posted in prisoner-of-war camps and in places where civilians are interned (Article 41 of the Third Convention and Article 99 of the Fourth Convention). For prisoners of war, the content of the agreements must be posted in their own language, and for civilian internees in a language they understand. See also Article 5 of the First and Third Conventions and Article 6 of the Fourth Convention.

[71] *Proceedings of the Geneva Diplomatic Conference of 1929*, p. 511.

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